

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Cablevision of Paterson LLC d/b/a Cablevision of	)	
Allamuchy,	)	
	)	File No. CSB-A-0684
Cablevision of Newark,	)	
	)	
Cablevision of Oakland, LLC,	)	
	)	
CSC TKR, Inc. d/b/a Cablevision of Morris	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 3, 2004**

**Released: May 4, 2004**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. Cablevision of Paterson LLC d/b/a Cablevision of Allamuchy, Cablevision of Newark, Cablevision of Oakland, LLC, CSC TKR, Inc. d/b/a Cablevision of Morris (collectively “Cablevision”), the franchised cable operator serving the areas of Allamuchy, Newark, Oakland, and Morris, New Jersey has appealed a local rate order adopted by the Office of Cable Television of the New Jersey Board of Public Utilities (“Board”) on October 31, 2002 (“order”),<sup>1</sup> which requires Cablevision to submit a separate final true-up filing for its system serving the Allamuchy franchise area.<sup>2</sup> The Board and the New Jersey Division of the Ratepayer Advocate (“Ratepayer Advocate”) <sup>3</sup> filed oppositions to the appeal to which TCI replied. Cablevision also filed a request for a partial stay of the Board’s order on the Form 1240, which the Board and Ratepayer Advocate opposed. Cablevision’s stay request is rendered moot by this order and is dismissed. Based upon our review of the record, we grant Cablevision’s appeal.

**II. BACKGROUND**

2. The Communications Act provides that, where effective competition is absent, cable rates for the BST are subject to regulation by franchising authorities.<sup>4</sup> Rates for the BST should not exceed rates that would be charged by systems facing effective competition, as determined in accordance with

<sup>1</sup> BPU Docket No. CR01110706; CR01110714; CR01110715; CR01110718; CR01110719; CR0111026; CR01110727; CR01110729.

<sup>2</sup> Cablevision is only appealing the part of the order that requires a separate final true-up for the Allamuchy franchise area. It does not challenge the order’s determination on maximum permitted Basic Service Tier (“BST”) rates or the ordering of refunds.

<sup>3</sup> The Ratepayer Advocate is an independent New Jersey State agency that represents the interests of utility consumers, including residential, business, commercial, and industrial entities, and participates in proceedings before the Board. Ratepayer Opposition at 2.

<sup>4</sup> 47 U.S.C. § 543(a)(2).

Commission regulations for setting rates.<sup>5</sup>

3. Rate orders issued by franchising authorities may be appealed to the Commission pursuant to Commission rules.<sup>6</sup> In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as a reasonable basis for that decision exists.<sup>7</sup> The Commission will reverse a franchising authority's rate decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules. If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.

4. An operator that wants to increase its BST rate has the burden of demonstrating that the increase is in conformance with the Commission's rules.<sup>8</sup> In determining whether the operator's rates conform with our rules, a franchising authority may direct the operator to provide supporting information.<sup>9</sup> After reviewing an operator's rate forms and any other additional information submitted, the franchising authority may approve the operator's rate increases or issue a written decision explaining why the operator's rates are not reasonable.<sup>10</sup> If the franchising authority determines that the operator's proposed rates exceed the MPR as determined by the Commission's rules, it may prescribe a rate different from the proposed rate and order refunds, provided that it explains why the operator's rate or rates are unreasonable and the prescribed rate is reasonable.<sup>11</sup>

5. On November 1, 2001, its annual filing date, Cablevision filed multiple FCC Form 1240s with the Board. The Form 1240s proposed basic tier rates ("BST") for all of Cablevision's New Jersey franchises area to become effective on February 1, 2002. At that time, Cablevision was in the process of completing a rebuild of its cable system serving Allamuchy and migrating the Allamuchy subscribers to Cablevision's Morris System head-end. In case the migration was delayed, Cablevision filed a stand-alone Form 1240 for Allamuchy.

6. Cablevision filed an effective competition petition with the Commission on January 31, 2002 alleging that it was subject to effective competition, which the Board opposed. On September 13, 2002, Cablevision executed a Stipulation of Settlement with the Board's staff and the Ratepayer Advocate that resolved a number of the Form 1240 filings submitted by Cablevision for its New Jersey franchise areas, including Allamuchy. On September 19, 2002, the Commission issued an order granting Cablevision's effective competition petition for Allamuchy and other franchise areas.<sup>12</sup> On September 25, 2002, an Administrative Law Judge ("ALJ") filed his Initial Decision with the Board recommending that the Stipulation be approved. On October 31, 2002, the Board issued its order adopting the Stipulation and Initial ALJ Decision, but also directed Cablevision to submit a final Form 1240 true-up for the Allamuchy system beginning when the last true-up period ended, August 1, 2001, and ending when the Allamuchy

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<sup>5</sup> 47 U.S.C. § 543(b)(1); 47 C.F.R. § 76.922.

<sup>6</sup> 47 U.S.C. § 543(b)(5)(B); 47 C.F.R. § 76.944.

<sup>7</sup> Implementation of Sections of the Cable Television Consumer Protection and Competition Act, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993) ("*Rate Order*"); Third Reconsideration Order, 9 FCC Rcd 4316, 4346 (1994).

<sup>8</sup> 47 C.F.R. § 76.937(a).

<sup>9</sup> *Rate Order* at 5718.

<sup>10</sup> 47 C.F.R. § 76.936; *see* Ultracom of Marple Inc., 10 FCC Rcd 6640, 6641-42 (1995).

<sup>11</sup> *See* Century Cable of Southern California, 11 FCC Rcd 501 (1995); TCI of Iowa, Inc., 13 FCC Rcd 12020 (1998).

<sup>12</sup> Cablevision of Paterson d/b/a Cablevision of Allamuchy et al., 17 FCC Rcd 17239 (2002).

system migrated to the Morris Rebuild system, on or around January 31, 2002. Cablevision is challenging the Board's authority to require a "final true-up" for Allamuchy.

### III. POSITIONS OF THE PARTIES

7. Cablevision argues that the Commission has previously concluded, once it makes a finding of effective competition, that a local franchising authority's authorization to oversee or regulate BST rates is extinguished as of the date the cable operator submits its petition demonstrating the presence of effective competition in the franchise area.<sup>13</sup> As a result, Cablevision argues, the Board's authority to regulate BST rates in Allamuchy expired on January 31, 2002, the date Cablevision filed the effective competition petition.<sup>14</sup> Consequently, the Board has no authority to compel Allamuchy to submit the final true-up mandated in the October 31, 2002 order since the Board's power to require Cablevision to comply with rate regulation requirements and procedures had already expired. Cablevision states that, as a matter of law, all rate regulation-related rules cease to apply where the Commission has determined effective competition exists.<sup>15</sup> Thus, compelling Cablevision to submit a final true-up would violate the 1992 Cable Act because the Board's order would impose upon Cablevision a form of rate regulation after the Commission has determined that it is subject to effective competition.<sup>16</sup> Finally, Cablevision argues that the Board misinterprets our decision in *Falcon Cablevision* ("Falcon 2000")<sup>17</sup> because neither the rate filing nor the rate-effective period involved here predate the effectiveness of the finding of effective competition."<sup>18</sup>

8. In opposition, the Board and Ratepayer Advocate acknowledge that once the Commission granted Cablevision's effective competition petition, a local franchising authority is precluded from prescribing rates, ordering refunds, or otherwise overseeing or regulating BST service after the date on which the cable operator filed its effective competition petition with the Commission.<sup>19</sup> But they also argue that the Commission's finding of effective competition does not terminate the authority of a local franchising authority to regulate the period that preceded the effective competition finding.<sup>20</sup> Furthermore, prohibiting local franchising authorities from regulating rates in effect prior to a finding of effective competition constitutes a retroactive revocation of regulatory authority and contradicts section 76.914(d) of the Commission's rules which deals with revocation of franchising authority certification.<sup>21</sup> The Board asserts that the Commission's issuance of an effective competition order should not abrogate the local franchising authority's regulatory authority to issue directives in which the rate filing and rate-effective period predates the Commission's finding of effective competition. Finally, even if the Board's authority to regulate did terminate on the filing date once the petition for effective competition for Allamuchy was granted, under *Falcon 2000*, the Board had regulatory authority to review the reasonableness of rates charged to Allamuchy subscribers until January 31, 2002, which is the date Cablevision filed its effective

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<sup>13</sup> Cablevision Appeal at 5.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*; See also *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 190-191 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996).

<sup>16</sup> Cablevision Appeal at 5-6 ; See also Cable Television and Consumer Protection and Competition Act ("1992 Cable Act") Pub. L. No. 102-385, 106 Stat. 1460, § 3.

<sup>17</sup> *Falcon 2000*, 15 FCC Rcd 842, n.7 (2000).

<sup>18</sup> Cablevision Reply at 3.

<sup>19</sup> Board Opposition at 5; Ratepayer Advocate Opposition at 3.

<sup>20</sup> *Id.*

<sup>21</sup> 47 C.F.R. § 76.914(d).

competition petition.<sup>22</sup> Therefore, the Board had authority to require a true-up filing of the Allamuchy system during the period, from August 2001 through January 31, 2002.<sup>23</sup>

9. The Ratepayer Advocate asserts that the Board acted in conformance with federal and state rules in requiring Cablevision to file a final true-up for the Allamuchy system for the period beginning August 1, 2001 – January 31, 2002 since the true-up period predated the Commission effective competition finding.<sup>24</sup> The true-up is necessary for Allamuchy because the BST rate in effect prior to the time of Cablevision's effective competition filing was based on projected costs and not on actual costs. The Form 1240 instructions specify both a Projected Period and a True-Up Period.<sup>25</sup> It is imperative that final true-up costs be calculated to ensure that cable subscribers in Allamuchy are paying rates based on Cablevision's actual cost of providing the service during the Projected Period, and the grant of effective competition does not extinguish the Commission's obligation to true-up.

#### IV. DISCUSSION

10. The facts are not disputed by the parties. Cablevision filed its Form 1240 on November 1, 2001, for rates to become effective 90 days thereafter – February 1, 2002. Cablevision first presented its evidence to the Commission demonstrating that it is subject to effective competition in its petition seeking such a finding from the Commission on January 31, 2002. The Commission so held in its order of September 19, 2002. Thereafter, the Board issued its order on October 31, 2002, requiring Cablevision to submit a final true-up for the period August 1, 2001 to January 31, 2002.

11. The Commission has previously recognized the filing date of a petition submitted in support of a finding of effective competition as the effective date of the change in regulatory status.<sup>26</sup> The data, on which a petition seeking a finding of effective competition is based, always pre-dates the filing of the petition. We have concluded therefore that the filing of a petition with the necessary data contained therein will trigger the regulatory change in status. Since a Commission order granting such a petition essentially recognizes pre-existing competition, it makes little sense to delay the effectiveness of the regulatory change until the release of an order. Thus, the Board's authority to regulate ceased as of January 31, 2002. The only remaining issue is whether the Board had authority after January 31, 2002, to order a "true-up" of the Allamuchy system's rates for the period from August 2001 through January 2002.

12. In *Falcon 2000*,<sup>27</sup> we stated

Our issuance of an effective competition order did not abrogate the City's jurisdiction to respond to this [local rate] order, since the rate filing and the rate-effective period at issue in this proceeding predate our finding of effective competition. However, the City may not prescribe rates after March 5, 1997, the date on which Falcon filed its effective competition petition, and Falcon shall not be liable for refunds related to

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<sup>22</sup> *Id.*

<sup>23</sup> Board Opposition at 7-8.

<sup>24</sup> Ratepayer Advocate at 3.

<sup>25</sup> *Id.* at 3-4.

<sup>26</sup> See *Falcon Cablevision*, 12 FCC Rcd 8229, 8234 (1997); *Falcon Cable Systems*, 18 FCC Rcd 2896, 2897-2898 (2003); *Rifkin & Associates*, 17 FCC Rcd 14233, 14234 (2002).

<sup>27</sup> 15 FCC Rcd 842, n.7.

rates charged after that date.<sup>28</sup>

13. The Form 1240 is an annual filing and as part of that filing, operators perform a true-up of “previously projected inflation, changes in external costs and changes in the number of regulated channels and adjust its rates for these actual cost changes.”<sup>29</sup> As the language explicitly indicates, the true-up is to be performed as part of the cable operator’s annual filing. There is no provision for a separate stand alone true-up filing. The true-up period that the Board’s order addressed is not part of the Form 1240 submitted by Cablevision and reviewed by the Board. The August 2001 to January 31, 2002 true-up period was not covered by Cablevision’s Form 1240 filed in November 2001, and would not have been addressed until Cablevision filed a 2002 Form 1240. Both *Falcon 2000* and *Falcon Cablevision* seek to preserve the authority of franchising authorities to complete pending rate proceedings that preceded the cable operator’s deregulation. However, in this instance, the true-up period that the Board sought to regulate was not part of the rate period covered by the Form 1240 reviewed by the Board. Although the Form 1240 was filed before Cablevision was deregulated, the rate-effective period did not include the true-up period at issue - August 1, 2001 to January 31, 2002. Consequently, the Board has no authority to order a true-up for the period of August 1, 2001 to January 31, 2002.

## V. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that the Appeal of the Local Rate Order filed by Cablevision of Paterson LLC d/b/a Cablevision of Allamuchy, Cablevision of Newark, Cablevision of Oakland, LLC, CSC TKR, Inc. d/b/a Cablevision of Morris on November 29, 2002 **IS GRANTED** and the local rate order of the Office of Cable Television of the New Jersey Board of Public Utilities **IS REMANDED** for further consideration consistent with this Memorandum Opinion and Order.

15. **IT IS FURTHER ORDERED** that Cablevision of Paterson LLC d/b/a Cablevision of Allamuchy, Cablevision of Newark, Cablevision of Oakland, LLC, CSC TKR, Inc. d/b/a Cablevision of Morris’s stay request **IS DENIED**.

16. This action is taken pursuant to authority delegated by § 0.283 of the Commission’s rules.<sup>30</sup>

## FEDERAL COMMUNICATIONS COMMUNICATION

John B. Norton  
Deputy Chief, Policy Division  
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<sup>28</sup> See also *Falcon Cablevision*, 12 FCC Rcd 8229, 8234 (1997) (“Our recent issuance of the *Falcon* Effective Competition Order does not abrogate the City’s jurisdiction to respond to this Order. The rate filing and part of the rate-effective period at issue in this proceeding predate our finding of effective competition.”)

<sup>29</sup> 47 C.F.R. § 76.922 (e)(3).

<sup>30</sup> 47 C.F.R. § 0.283.